Compromising the Rule of Law while Compromising on the Rule of Law

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On 10 December 2020, the European Council adopted conclusions regarding the draft Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget ("Conditionality Regulation" hereinafter). Rather than a ringing declaration reaffirming the importance of the rule of law for the EU, the EUCO Conclusions undermine the rule of law on all fronts.

The EUCO Conclusions are formally non-binding, the outcome of a "compromise" brokered by the German presidency of the Council with the governments of Hungary and Poland. But they are clearly intended to cast a long shadow over the Conditionality Regulation to make it practically unusable. Both Hungary and Poland are currently subject to protracted Article 7 proceedings before the Council in order to determine the existence of a clear risk of a serious breach by Polish authorities of the rule of law (referred to the Council by the Commission in 2017) and a clear risk of a serious breach by Hungarian authorities of many of the EU's foundational values (referred to the Council by the Parliament in 2018). These procedures have been stuck in the Council while the German presidency has done little to help enforce the rule of law in either Member State. Instead, the German presidency chose to ignore the substantial evidence that Hungary and Poland threaten basic European values and gave them what they wanted in this "compromise" so that they would not hold the EU budget and Recovery Fund hostage to their rule-of-law-violating demands. Hostage-taking is punished in most jurisdictions, but evidently not in the EU. In the EU, it gets rewarded even if it means breaching the EU Treaties to appease those breaching the same Treaties at home.

When the hostage threat emerged, the German Chancellor emphasized the need for "all sides" to make compromises. One might find that stance surprising considering that she previously said, "It is important that we defend the rule of law, which is one of our goals during the German Presidency." The agreement that the German presidency brokered started from the premise that democracies should compromise with autocracies, which is akin to saying law-abiding citizens must make compromises with criminals. Moreover, the EUCO Conclusions award a great victory to Orbán and Kaczy#ski, which can now look forward to years of non-enforcement and only weak, too-little-too-late enforcement after that. Whether the EUCO Conclusions are treated as legally binding by other EU institutions, in breach of the Treaties, or just informally influence enforcement of the Conditionality Regulation, which we argue they should not, European leaders will have allowed Orbán and Kaczy#ski to further water down the mechanism meant to bring an end to their ongoing and close-to-be-completed destruction of all internal checks on their power, and in the case of Hungary's "mafia state", industrial-scale corruption and personal enrichment thanks to EU funds.

Some EU leaders may assert that EU money will now be brought under the rule of law given that the Conditionality Regulation is now guaranteed to pass. But they are wrong.

1. This is not a victory for the Rule of Law

The purpose of the Conditionality Regulation as originally proposed was to condition the distribution of EU money on compliance with the rule of law so that EU money no longer funded national autocrats. Orbán's Hungary and Kaczy#ski's Poland have been included by democracy experts in a group of 10 countries that have engaged in the most severe democratic backsliding in the past ten years. Freedom House now considers Hungary no longer a democracy but the EU's first "hybrid" or quasi-authoritarian regime. Poland's rankings in global indices have also fallen fast so that Poland is now considered only a "semi-consolidated democracy". EU money has paid for much of this destruction, and the Conditionality Regulation originally grew out of a sense that this flow of funds should be stopped. But the form of the Conditionality Regulation as it has emerged through the law-making process is a shrunken version of its previous self – hard to trigger, limited in what it can reach, with the rule of law not even included in its title anymore due to another "compromise" we owe to the German presidency. Moreover, its implementation, "thanks" to the EUCO Conclusions, will be delayed.

Over the ten years that the rule of law problem has been festering in the EU, EU institutions should have learned that time is absolutely of the essence and that only prompt action is effective. And yet, the EUCO Conclusions aim to build in yet another postponement before the Conditionality Regulation can be used because they state, with the von der Leyen Commission's collusion, that the Regulation shall not be enforced before the European Court of Justice issues a ruling on its legality and not before a complex consultation process with the Member States produces "guidelines" that will make clear how the mechanism will be used.

Delay constitutes appeasement because it permits Orbán and Kaczy#ski to further entrench the destruction of the rule of law in ways that make reversal more difficult if not virtually impossible. This bodes ill for protecting the rule of law.

But perhaps protecting the rule of law is no longer the point. The Conditionality Regulation was once designed primarily for that purpose but now appears primarily designed to protect the budget because it can only be triggered when funds have already been misspent. That was already hardwired into the earlier compromises which even took "the rule of law" out of the title of the Regulation. Under the EUCO Conclusions, however, the supposedly independent Guardian of the Treaties is *instructed* to delay enforcing the weakened the Conditionality Regulation. A delay in implementing the Regulation will mean that most of the funds this Regulation is supposed to protect will already have been committed while the Regulation awaits its debut.

The Recovery "Next Gen" Fund is designed to be spent quickly. It is supposed to allow EU Member States, hard hit by the Covid-19 virus, to mitigate the effects of

the shutdowns and economic dislocations that have resulted from the pandemic. As a result, national allocations are very probably to be spent precisely during the two years it will likely take for the ECJ to review it. Under the European Council Conclusions, the Commission will be hamstrung from reviewing these budgetary commitments as they occur.

Moreover, in Hungary, we can expect that the Orbán government will behave in the new budget cycle the same way it behaved in the last budget cycle. From 2014-2020, the budget strategy of the Hungarian government was "frontloaded absorption." The majority of the funds for the entire 2014-2020 cycle were already committed by Spring 2018, when the national parliamentary election was held. Given that the next Hungarian national election is scheduled for spring 2022, we can expect the funds allocated in this new budget cycle to also be committed before the election, which itself will almost surely be *before* the ECJ has cleared the Regulation for use.

Of course, if the Regulation takes effect on 1 January 2021, then the Commission can go back and retroactively look at how the money was spent, once it is given the green light to do so. But the Regulation itself says that while the Member State may be docked funds for violating the rule of law, the final recipients of the money should not be the ones to suffer. As the Regulation states in Article 5(5): "the Commission shall do its utmost to ensure that any amount due from government entities or Member States in accordance with paragraph 2 of this Article [implementing the withholding of funds] is effectively paid to final recipients or beneficiaries…"

Suppose a corrupt government inside the EU awards contracts to its friends using EU money and does so quickly while the ECJ has the Regulation under review. The EU will still guarantee that the friends are paid, even after it finds that the money has been corruptly spent. This is not such a hypothetical case. As the Corruption Research Center Budapest showed in its analysis of 248,404 Hungarian public tenders from 2005 through 2020, "The share of public procurements won by crony companies . . . has increased significantly since 2011." Moreover the problem of corruption seemed to be even worse in EU-funded contracts than in contracts with purely domestic sources. If Viktor Orbán repeats during the new budget cycle what he did during the last one, then he will award his friends the lion's share of the EU-funded public contracts in the next year and a half before the election. If the Commission is authorized to spring into action only two years from now, after both the recovery and budget funds have largely been committed, the Commission may well find that EU funds have been corruptly spent. But as the Regulation is currently written, the EU will still have to ensure that Orbán's friends are paid. Well done to the German presidency!

No wonder Viktor Orbán immediately published a video on his Facebook page on the day that the EUCO Conclusions passed, bragging about the champagne that awaited him after the vote. After all, he knows better than anyone that rule of law delayed is rule of law destroyed.

2. The EUCO Conclusions systematically undermine the Conditionality Regulation

The (unlawful) delay in enforcement of the Regulation limits its effects in time and in fact makes it ridiculously easy for any corrupt government simply to favour its friends without limits. But the EUCO Conclusions also blunt the effects and limit the potential of this Regulation in other ways while they also cast doubt on other mechanisms for controlling rogue states in the EU. Let's review the entire content of this "compromise" whose compatibility with the EU Treaties and justiciability will only be briefly examined in the next section as both issues have already been compellingly analysed by Alemanno and Chamon and Dimitrovs.

The EUCO Conclusions begin in point 1 with a legally *inaccurate* statement by suggesting that only Article 7 TEU may be used to "address the breaches of the Union's values under Article 2 TEU". In addition to embarrassingly misrepresenting the text of Article 7 TEU which does *not* concern mere breaches of Article 2 TEU but rather aims to address "a clear risk of a serious breach … of the values referred in Article 2 (Article 7(1) TEU) and "the existence of a serious and persistent breach" of Article 2 values (Article 7(2) TEU), this statement contradicts what the European Court of Justice has already settled in finding that the attempted purge of Poland's Supreme Court was a violation of the rule of law under Article 2 TEU, concretised by Article 19 TEU. Article 2 TEU, as a result, can clearly be the subject of an infringement action. In addition, the Council has already accepted the fact that the Commission's pre-Article 7 framework can be used to prevent and/or accumulate evidence of breaches of Article 2 values prior to invoking Article 7 notwithstanding the now totally discredited opinion of the Council Legal Service claiming otherwise in 2014. The EUCO Conclusions don't just blunt the effects of the Conditionality Regulation but they cast aspersions on anything the other institutions can do and have done to enforce Article 2 values. One may note in passing that the EUCO does not seem aware of the EEA financial mechanism which provides that all programmes and activities funded by it for the period 2014-2021 "shall be based on the common values of respect for human dignity, freedom, democracy, equality, the rule of law and the respect for human rights including the rights of persons belonging to minorities". This provides a basis for suspending funds to EEA recipient not complying with those values, including the rule of law. In other words, an external agreement like the EEA, which is an integral part of EU law, is yet another mechanism to address the breaches of the Union's values notwithstanding what the EUCO conclusions claim.

While less harmful, point 2 of the EUCO Conclusions, by emphasising that the Regulation "is to be applied in full respect of Article 4(2) TEU" gives an unfortunate veneer of credibility to the fallacious claim of just two governments out of 27 that dismantling checks and balances can be justified in the name of their alleged "constitutional identity". Paragraph 2 of the conclusions, in other words, adopts the perspective of two rogue states and reassures them that their "concerns", no matter how unsubstantiated, fallacious and deceitful, will be respected.

Point 2 then provides a long list of understandings that the European Council lays out, as if to *instruct* other EU institutions in how to understand the Regulation. Several of these understandings go so far as to orchestrate the order in which different institutions perform their respective roles and how they should carry out their responsibilities.

Point 2(a) aims to summarise the primary aim of the Regulation as "the protection of the Union budget … and the Union's financial interests" but omits any mention of the rule of law or Article 2 TEU for that matter.

Point 2(b) embarrassingly states that The Regulation should not be applied subjectively, unfairly, discriminatorily etc. while making a reader wonder why it is necessary to say so.

Point 2(c) announces by ventriloquism, that the Commission "intends to develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment." In fact, *there is no such requirement* of "guidelines" in the Regulation itself, so this additional stage in the procedure was cooked up in a side deal between the European Council aka Angela Merkel and the Commission aka Angela Merkel's former Minister of Defence. Furthermore, the EUCO Conclusions announce that the Commission will devise these guidelines "in close consultation with the Member States", without any legal basis and justification for what amounts to yet another layer of "dialogue" *not formally mentioned in the Regulation itself* and, of course, providing yet another opportunity for the rogue states to delay and derail the enforcement procedure. It also beggars belief that for the European Council, it is fine not to consult the Parliament for the developments of these "guidelines".

But it is in Point 2(c) that the delay we referred to above is embedded. The European Council announces that the Commission "will not propose measures under the Regulation" until after a judgment on the merits is adopted by the Court of Justice "should an action for annulment be introduced with regard to the Regulation" (which Hungary and Poland have indicated they will lodge). Moreover, there is additional delay built into the enforcement of Regulation because the newly added guidelines, to be developed in dialogue with the Member States, should only be finalized after the Court's eventual judgment. In short, and in violation of the Treaties, the European Council is instructing the Guardian of the Treaties not to enforce the Regulation when it comes into effect until the Regulation has run the gauntlet of an ECJ judgment and a protracted consultation procedure. Delays appease the rogue states.

Point 2(d) seems more innocuous as it merely repeats that the Regulation aims to complement other procedures set out in EU law. But in doing so, it further reinforces the idea that the only point of the Regulation is "to protect the Union budget … effectively." No mention is made of the protection of the rule of law which was the original point of the whole effort. The EUCO Conclusions here also just directly contradict the EUCO Conclusions of 21 July 2020.

Similarly, point 2(e) reflects the German presidency's repeated attempts to make the triggering of this mechanism as difficult as possible. The EUCO Conclusions state that the Regulation requires that "the causal link" between breaches of the rule of law "and the negative consequences on the Union's financial interests will have to be sufficiently direct and be duly established." But, underlining the suspicion that the Conditionality Regulation is now not centrally concerned with the rule of law, this section of the EU Conclusions overtly disowns the whole idea: "The mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism." Sadly, this is not incorrect. Indeed, the German presidency has been able to get the European Parliament to accept the introduction of an extremely onerous causality test in the Regulation (see use of "sufficiently direct way" in Article 4 which was apparently borrowed from Joined Cases T99/09 and T308/09). This *probatio diabolica* has only been made less "diabolical" by the European Parliament's introduction of the notion "serious risk", i.e., potential negative impact should suffice to qualify as a breach of the rule of law. Yet, the need to satisfy the "sufficiently direct way" test remains and only "breaches" rather than generalised deficiencies can be caught. The EUCO conclusions can however be criticised for omitting the inconvenient fact that the Regulation is supposed to catch individual breaches of the principles of the rule of law as well as widespread and/or recurrent breaches of the rule of law which take the form of recurrent practices, omissions and/or general measures.

More problematically, Point 2(f) amounts to a *rewriting* of the Regulation by stating that the "triggering factors set out in the Regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature". Never mind that triggering conditions listed in Article 4(2) of the Regulation says explicitly that the Regulation may be triggered when "other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union." The EUCO Conclusions essentially erase that part of the regulation by proclaiming that what precedes it is a "closed list." The point about the Regulation not relating to "generalised deficiencies" is however correct as this is yet another aspect of the German presidency's successful watering down of the Commission's initial proposal which also initially but no longer refers to the rule of law. One cannot help but feel like Alice in Wonderland who has been left with the grin without the cat.

Point 2(g) seemingly aims to add that a "thorough dialogue" must occur between the Member State and the Commission before the Regulation is triggered against a Member State, even though this step is not included in the Regulation. Indeed, the only reference to dialogue is to be found in Article 6 of the Regulation which provides the Parliament with the option to "invite the Commission for a structured dialogue on its findings". This new dialogue provided by the European Council is layered on top of the dialogue that should occur between all Member States and the Commission when the "guidelines" for using the Regulation are being prepared. In this section, the EUCO Conclusions add yet another step that the Commission must take *before* the Regulation can be used in a concrete case, a step that is not in the Regulation itself as it only provides for the sending of a written notification of the Member State

concerned, the obligation for the Member State concerned to provide all required information and the option of make observations.

In point 2(h), the European Council inserts ominous language that requires the Commission to "bear full responsibility" for the accuracy of its findings about a Member State and indicates that measures undertaken against a Member States under the Regulation shall be promptly reviewed with an aim toward removing them upon request of the Member State involved. In both cases, the points drip with suspicion that the Commission will not properly do its job because it will be tempted to use biased information and/or will leave the measures in place for too long.

Point 2(j) seemingly aims to transform a mere recital of the Regulation into a formal parallel process involving the European Council, an option that was firmly rejected by the Parliament in the trialogue over the Regulation. The "emergency brake" (also known as the "Orbán loop") as originally proposed by the Council would have permitted an affected Member State to move its case from the Council to the European Council for review and decision, but this provision had been banished by the Parliament in the trialogue process to a recital. Now an appeal to the European Council is back in this part of the EUCO Conclusions. The European Council says that it "will" put any such appeal on its agenda and "will strive to formulate a common position" should it be seized exceptionally by a Member State that might be subject to measures under this Regulation. The European Council has therefore turned a recital into a parallel procedure, a last chance for a Member State to call off the dogs of the Commission before they bite. But what Commission would proceed to cut funds to a Member State if the "common position" of the European Council during such a procedure was "we don't think these measures are warranted" or "give the Member State another chance"? By indicating its receptiveness to this evasion of the Commission's procedure, the EU Conclusions have undermined the role of the Guardian of the Treaties in the whole process of adopting measures based on the Regulation.

Lastly, point 2(k) repeats the final provision of the Regulation which provides for its application as from 1 January 2021 with regard to both the new Multiannual Financial Framework and the Next Generation EU fund as well as its entry into force on the 12th day following the publication of the Regulation in the EU Official Journal. However, as previously noted, point (c) instructed the Commission not to apply the Regulation until after an ECJ judgment is issued and some guidelines are then finalized by the Commission. This can only mean that the Regulation would enter into force and then remain *unapplied* at the insistence of the European Council until the conditions it has defined on its own motion are met. That is not normal.

In Section 3 of the EUCO Conclusions, the European Council "welcomes" a Declaration to be adopted by the Commission "expressing its commitments" to go along with all of the ways in which the EU Conclusions have changed the meaning and operation of the Conditionality Regulation. Phrased to make it appear as if the Commission has volunteered to be constructive, the provision has the ring of an offer that the Commission could not refuse.

Finally, the EUCO Conclusions end by exhorting the Parliament and Council to enact the MFF, the Conditionality Regulation and Own Resources decision to finance the Recovery Fund immediately, now that the EUCO has remade the whole deal and which can yet however be undone by Hungarian and Polish governments by blocking the ratification of the Own Resources decision or getting their fake constitutional "courts" to find the Conditionality Regulation ultra vires whenever convenient.

It has since emerged that the Council Legal Service has issued an opinion which alleges that the EUCO Conclusions respect "the content and objectives of the [rule of law] Regulation and is compatible with it. In particular, no element … is in conflict with the Regulation, contradicts it or amends it" as the EUCO conclusions would merely offer "clarifications, interpretative assurances". It is submitted that this assessment of the Council Legal Service is wrong. Several aspects of the EUCO Conclusions breach EU law.

3. If the EUCO Conclusions breach EU Law, how can the breach be remedied?

As Alberto Alemanno and Merijn Chamon have compellingly argued in the *Verfassungsblog* and Aleksejs Dimitrovs in *EU Law Live*, the EUCO conclusions do not comply with EU primary law, particularly the principle of institutional balance. This is because a) the European Council gives instructions to the European Commission, in breach of the Commission's independence; b) the conclusions *de facto* amend the Regulation without using the proper procedure, especially given that the TEU prohibits the European Council to exercise legislative functions and c) the Conclusions suspend the application of the regulation until the end of the potential action for annulment brought by Hungary and Poland, which encroaches directly upon the prerogatives of the Court of Justice while introducing an unlawful presumption of illegality of the Regulation and inventing a new unlawful principle that an annulment action can have a suspensory effect when the text of Article 278 states literally the opposite!

Alemanno and Chamon also argue that an action for annulment against these conclusions brought under Article 263 TFEU would be admissible since the text clearly intends to create legal effects. We completely agree with their arguments, and would only add a few more points about the way that actions could be brought before the Court of Justice.

First, a potential action for annulment of the EUCO Conclusions could be complemented by an application for suspension, in accordance with Article 160 of the Rules of Procedure of the Court of Justice. A suspension, as an interim measure while the case is considered, may be granted by the Court if three conditions are met: 1) the action in the main proceedings must not appear, at first sight, to be without reasonable substance; 2) the applicant must show that the measures are urgent and that a serious and irreparable harm would occur without them and 3) the interim measures must take account of the balancing of the parties' interests and

of the public interest. Given what we have already noted above, the first condition is surely met. Moreover, the Court has already considered, notably in its interim measures orders in the two cases *Commission v Poland* (see here and here), that breaches of the rule of law can be serious and irreparable. If the operation of the EUCO Conclusions allow breaches of the rule of law to continue, then a suspension of these Conclusions would be warranted. Finally, since the suspension of the Conclusions would only lead to the "normal" application of the Regulation from the moment that it enters into effect, it could hardly be considered disproportionate especially considering that a regulation is supposed to be "binding in its entirely and directly applicable in all Member States" (Article 288 TFEU and see also Article 297(2) TFEU).

Second, an action for annulment could be combined with an action against the Commission for failure to act, under Article 265 TFEU, should it refrain from formulating the guidelines that are necessary for the implementation of the regulation. This, however, would imply that such guidelines are legally required by the Regulation – which is far from obvious since the text of the Regulation does not explicitly call for them. In fact, the requirement that the Commission develop such guidelines is one of the many reasons why the EUCO Conclusions may have overstepped their proper role in the EU's institutional balance. An action for failure to act might instead be brought if the Commission in fact relied on the EU Conclusions to wait before it enforced the Regulation when an occasion for doing so became clear or if it failed to gather the information necessary for enforcing the Regulation.

Third, both judicial avenues would require a qualified party to bring the case before the Court. This would be the main sticking point because the circle of those legally empowered to do so is arguably limited. NGOs and individuals, in particular, are likely to lack standing. The EUCO Conclusions could be considered a "regulatory act" given its clear intent to have legal effect. According to Article 263 TFEU, it is possible for legal and natural persons to bring an application for annulment against a regulatory act even if they are not individually concerned, provided that it does not entail implementing measures and is of direct concern to them. In its ruling in the case *Inuit Tapiriit Kanatami 2013*, the Court ruled that regulatory acts must be understood as "acts of general application other than legislative acts". According to Article 289(3) TFEU, legislative acts are "legal acts adopted by legislative procedure", which is not the case for conclusions of the European Council. Since the present conclusions cannot be said to have a determined addressee, they can also be considered of "general application", and thus qualify as "regulatory acts". Moreover, they do not seem to "entail implementing measures". However, for a natural or legal person to challenge such acts judicially, these acts must also be "of direct concern to them". It is settled case-law that this condition means that the act must directly affect the legal position of the applicant. This condition would be hard to satisfy concerning an application against the conclusions of the European Council.

That leaves the so-called "privileged applicants", i.e. Member States, the European Parliament, the Council and the Commission, which do not have to justify any standing. The European Commission could clearly bring such an action, since it is its prerogatives under the Conditionality Regulation that are the most affected.

However, the Commission's pledge to adopt a declaration expressing its intention to abide by the Conclusions, referred to in the Conclusions themselves, makes such a move extremely unlikely. A Member State could decide to bring an action, but that would mean reneging on the approval that it gave to these Conclusions in the European Council.

That leaves the European Parliament. At first, the reactions from the main political groups made it seem unlikely that there would be any appetite to initiate a judicial challenge. But with a couple of days to absorb the substantial changes in the Conditionality Regulation that the EUCO Conclusions made, the Parliament seems to be bestirring itself to act. As we write, we understand that the main parliamentary groups are discussing a parallel declaration to the EUCO Conclusions laying out Parliament's own understanding of the Regulation. As a proper co-legislator, the Parliament's views should be more compelling than those of the European Council.

Could the Parliament not only pass a parallel declaration, but mount an action for annulment against the EUCO Conclusions immediately as well as an action for failure to act against the Commission if the Commission allows itself to be directed by the EUCO Conclusions? It would require an extraordinary act of political will, but throughout the Rule of Law crisis of the last decade, it has been the Parliament that has always had the strongest commitment to basic European values. But if the Parliament cannot rise to the occasion to challenge the EUCO Conclusions, we might end up with a situation in which an illegal act of the European Council is maintained for lack of any judicial challenge. Ironically, a text regarding the protection of rule of law at national level might therefore reveal a rule of law flaw… at EU level.
